

No. 83-1017

UNITED STATES SUPREME COURT

October Term 1983

PAUL BOHRER,)
)
Petitioner,)
)
v.)
)
HANES CORPORATION, et al.,)
)
Respondents.)

REPLY OF PETITIONER TO BRIEF
OF RESPONDENTS IN OPPOSITION

Jonathan R. Harkavy
700 Southeastern Bldg.
Greensboro, NC 27401
(919) 274-2992

Counsel of Record

Of Counsel:

Norman B. Smith
Smith, Patterson, Follin,
Curtis, James & Harkavy
700 Southeastern Bldg.
Greensboro, NC 27401

L. Bruce Fryburger
1661 Frost Bank Tower
San Antonio, TX 78205

No. 83-1017

UNITED STATES SUPREME COURT

October Term 1983

PAUL BOHRER,)
)
Petitioner,)
)
v.)
)
HANES CORPORATION, <u>et al.</u> ,)
)
Respondents.)

REPLY OF PETITIONER TO BRIEF
OF RESPONDENTS IN OPPOSITION

Petitioner Paul Bohrer submits this reply solely to address respondents' argument that the petition raises issues which were not raised in the courts below. That argument is incorrect and thus offers no basis for denying the petition.

First, respondents say that the constitutional and statutory propriety of granting a judgment notwithstanding the verdict was not raised in the courts below. Brief of Respondents, pp. 26-27.

That assertion is demonstrably false. Petitioner's opening brief and reply brief in the Fifth Circuit explicitly rely upon the petitioner's right to a jury trial under the Seventh Amendment as a rationale for reversing the trial court's judgment. E.g., Brief for Appellant, pp. ii, 18, 34, 35; Reply Brief for Appellant, pp. 4, 8, 14. Likewise, petitioner's post-verdict brief in the trial court relies explicitly on the Seventh Amendment on pages 16 and 29 and refers to his right to a trial by jury on page 23. For respondents to assert in this Court that the substantive jury trial issue was not raised in the courts below is, to be most charitable, inaccurate.¹

¹The fact that neither the Fifth Circuit nor the district court dealt with petitioner's jury trial argument shows the inattentive manner in which those courts applied Rule 50 of the Federal Rules of Civil Procedure to this case and

[cont'd]

Second, respondents say that petitioner did not raise the Rule 50 procedural issue in the trial court. Brief of Respondents, p. 27. What respondents fail to tell this Court, however, is that the only issue they raised following the verdict against them was "[w]hether the jury verdict in the instant case was contrary to the clear weight of the evidence so as to warrant a judgment in favor of defendants notwithstanding the verdict or, in the alternative, a new trial." Brief in Support of Defendants' Motion, etc., p. 4. Because the respondents contested only the weight and not the sufficiency of the evidence supporting the verdict, there was no need to argue any procedural issue under Rule 50. Out of an abundance of caution,

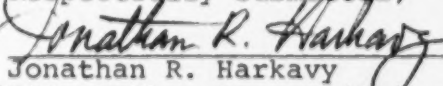
highlights the need for this Court to address the proper application of this jury control device to findings of unlawful motivation.

however, petitioner's post-trial submission urged that neither a new trial motion nor a judgment notwithstanding the verdict should be granted. After the trial court surprisingly entered a judgment notwithstanding the verdict (instead of granting a new trial motion addressed to the weight of the evidence), petitioners raised at the first opportunity in the Fifth Circuit the propriety of granting a judgment notwithstanding the verdict in the absence of a motion for a directed verdict at the close of the evidence. Thus, it is misleading in the extreme for respondents to suggest to this Court that the procedural issue was not raised below. That issue was fully briefed by the parties in the court of appeals; the court of appeals explicitly determined the issue; and the issue is properly before this Court.

Absent the incorrect assertions about

what issues were raised in the courts below, respondents' opposition to the petition would not have merited a reply. In view of the lack of a forthright response to the petition and the importance of both the procedural and substantive issues raised by the petition, petitioner has deemed it necessary to demonstrate that this case is an appropriate vehicle for resolving both of these pressing issues. This Court should therefore issue a writ of certiorari to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,


Jonathan R. Harkavy
700 Southeastern Building
Greensboro, NC 27401
(919) 274-2992

Counsel of Record

Of Counsel:

Norman B. Smith
Smith, Patterson,
Follin, Curtis,
James & Harkavy

L. Bruce Fryburger
1661 Frost Bank Tower
San Antonio, TX 78205

700 Southeastern Bldg.
Greensboro, NC 27401